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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The questions presented by the petitioner are not properly framed in that they assume facts which were never established by probative evidence at the trial of this case, and misconstrues the holding of the Fifth Circuit. The questions presented are properly framed as follows:

1. In a private treble damage action based upon an alleged violation of §2 (a) of the Robinson-Patman Act, 15 U.S.C.A. §13 (a), is the plaintiff automatically entitled to damages in the amount of the alleged price difference, thereby dispensing with the necessity of proving (1) actual loss to his business as a proximate consequence of the discrimination and (2) the amount of said injury?

2. Whether bare, self-serving, conclusory assertions of damage by Mr. Payne, which were totally uncorroborated by other evidence, constitute sufficient evidence to prove that the petitioner suffered antitrust injury as a proximate consequence of respondent's retail sales incentive programs?

3. Did the Fifth Circuit err in holding that there was insufficient evidence to show either the fact of antitrust damage or the amount of such damage?

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STATEMENT OF THE CASE

I. The Proceedings Before The Fifth Circuit.

Following the adverse jury verdict and the denial of its motion for judgment notwithstanding the verdict or for new trial, respondent, Chrysler Motors Corporation (hereinafter sometimes referred to as "Chrysler"), appealed to the Fifth Circuit Court of Appeals on several separate and distinct grounds. These grounds may be summarily categorized as follows: First, respondent urged that there was a total failure of proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C.A. §13(a), since each sales incentive program was carefully designed to provide all Chrysler dealerships with an equal opportunity to participate therein. Respondent also argued that there was not sufficient evidence to allow the jury to infer that injury to competition might result from the programs. Second, respondent urged that petitioner was not entitled to recover damages under §4 of the Clayton Act, 15 U.S.C.A. §15, since it had not proved (1) that it had in fact suffered any antitrust injury as a proximate consequence of said program or (2) the amount of such injury. Third, respondent challenged several parts of the trial judge's charge to the jury. And, fourth, respondent challenged several evidentiary rulings by the trial judge.

The Fifth Circuit only found it necessary to consider the second category of urged error, recognizing that a failure to satisfy the requirements of §4 of the Clayton Act precluded the recovery of damages regardless of whether there had been a violation of the antitrust laws.[1] In a well reasoned

[1]The Fifth Circuit did not affirm the jury's finding of a violation of §2(a) as suggested by petitioner. (Pet. Br. 3). Instead, the court specifically stated that it found it unnecessary to consider whether petitioner proved a violation of §2(a) of the Robinson-Patman Act, since it found petitioner had not proven its right to recover damages under §4 of the Clayton Act. 607 F.2d at 1135 (J.A. 4).

and legally sound opinion written by Judge Frank M. Johnson, Jr., the Fifth Circuit held that petitioner had not satisfied the requirements for recovering damages under §4 since it (1) had failed to prove that it had sustained cognizable antitrust injury from the sales incentive programs and (2) had failed to prove the approximate amount of any such injury. Following the lead of the Second Circuit in *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), and this Court's teachings in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Fifth Circuit held that in a §2(a) case more than a mere threat to competition must be shown in order for the plaintiff to recover damages. The court held that the injury with which §2(a) is concerned must be shown to have actually occurred, and that plaintiff was damaged as a result. The court then correctly concluded that the competition with which §2(a) is concerned is only harmed "to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor." 607 F.2d 1136 (J.A. 7). Finding no such proof in this case, the court reversed and remanded with instructions to enter judgment in favor of Chrysler.

The Fifth Circuit's opinion is not as burdensome and far reaching as petitioner would have this Court think. Nowhere in its opinion did the Fifth Circuit hold that specific lost sales had to be proven or that proof of lost sales is the only means of proving the fact of damage. Nor did the Fifth Circuit hold that proof of injury could not be based on circumstantial evidence. All the court held was that there was not sufficient probative evidence in this case for the jury to infer the necessary antitrust injury or the approximate amount thereof.

Petitioner's brief is replete with assertions of facts for which there is no probative evidence in the record. Because of petitioner's misstatements, an additional recital of what the evidence proved or, more appropriately, failed to prove is necessary.

II. Statement of the Facts.

The retail sales incentive programs challenged by petitioner were programs which were offered by Chrysler to all of its dealers throughout the United States. (Tr. 446, 450-451, 460; J.A. 171-172, 179-180). Such programs are used not only by Chrysler but also by its chief competitors, Ford and General Motors, to stimulate sales.[2] (Tr. 475-476; J.A. 189-190). Under respondent's programs, monetary payments were made to dealers based on their new car retail sales of Chrysler's automobiles. (Tr. 139, 445; J.A. 98, 170). The purpose behind these programs was to stimulate *all* of respondent's dealers to sell more cars, thereby increasing Chrysler's share of the American automobile market. (Tr. 444, 451-452; J.A. 167-168, 176-178).

Payments under the programs were dependent on accomplishments against wholesale and/or retail objectives which Chrysler computed, according to uniform procedures, based on each dealer's market potential and/or prior sales. (Tr. 105-106, 447, 463, 464, 473; J.A. 73-74, 173-174, 181-184, 188-189). Because of the way in which these objectives were computed, each dealer had an equal opportunity to participate in each program and to receive equal payments for comparable performance. (Tr. 447, 460, 473; J.A. 173-174, 179-181, 188-189). While each of the incentive pro-

[2]The recent case of *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980), indicates that foreign manufacturers or distributors also utilize incentive programs. Interestingly, in this case the court held that said programs did not violate §2(a) of the Robinson-Patman Act.

grams involved in this case vary to some degree, the majority may be classified as either a straight retail incentive program or a wholesale-retail incentive program.[3] (Tr. 445; J.A. 169-170).

The straight retail incentive programs were quite simple. Each dealer was assigned a retail sales objective which was nothing other than the number of retail sales made by the dealer during a prior period of time. The dealer was then paid a bonus for each sale in excess of its objective. The amount of the bonus would generally vary depending on the number of sales made in excess of the dealer's objective. For example, if the dealer attained 120% of its objective, it might receive a larger bonus for each sale in excess of its

[3]Respondent offered two other types of bonus programs. These programs were the 5% stock rebate program for 1972 and 1973 model vehicles and the fleet sales incentive programs. Under the 5% stock rebate program, the dealer could receive a refund of 5% of the factory price on each new prior year model vehicle in the dealer's inventory on the announcement day of the new model. (Tr. 65; J.A. 33). However, the 5% stock rebate was only available to dealers not participating in the retail sales incentive program being run at the close of the model year. In both 1972 and 1973, petitioner elected to receive the 5% stock rebate incentive program, rather than to participate in the 1972 Summer Sweepstakes and the 1973 Early Clean Up Bonus. (Tr. 168-171, 178-180; Pt. Ex. 48, 51, Tr. 222-223; J.A. 239, 242). The money received by each of the four Chrysler dealers located in the Birmingham area from the retail sales incentive programs and the alternative 5% stock rebates is set forth in Defendant's Exhibit 28 (Tr. 440; J.A. 267).

Under the fleet sales incentive programs, dealers received monetary payments on their fleet sales. A sale qualified as a fleet sale if it was made to a qualified fleet purchaser (one who generally purchased in large numbers), such as the Alabama Power Company. Since fleet sales were covered by separate programs, they did not count toward a dealer's sales objective under the retail sales incentive programs. (Tr. 77-78, 103-105; J.A. 40-42, 70-72). During the period involved in this case, petitioner worked hard to make fleet sales, and over 24% of its total new car sales were fleet sales. (Tr. 104; J.A. 71; Def. Ex. 31, Tr. 539, J.A. 268). Petitioner received $62,185 under the fleet sales incentive programs while the next highest Chrysler dealer in the Birmingham area received only $7,185. The total fleet incentive money received by each Chrysler dealer in the Birmingham area is set forth in Defendant's Exhibit 27 (Tr. 440; J.A. 266).

objective than it would receive if it sold less than 120% of its objective. Nevertheless, each dealer attaining the same level of achievement against its objective received the same bonus for each sale above its objective. (Tr. 462-464; J.A. 181-184).

Under the wholesale-retail incentive programs, a dealer was required to purchase a certain number of automobiles from respondent in order to qualify to participate in the program. Each individual dealer's purchase objective was determined by use of a standard formula which was uniformly applied to all Chrysler dealers nationwide.[4] If a dealer qualified to participate in the program by purchasing its objective, it then generally received bonus payments on each of its retail sales during the program period. As with the straight retail programs, the amount of the bonus was often based upon the percentage attainment of the dealer's objective. (Tr. 445-447; J.A. 170-174).

Petitioner and all other Chrysler dealers located in the greater Birmingham, Alabama metropolitan area paid the

[4]The standard formula used to compute each dealer's purchase objective gave equal weight to the dealer's rate of sales and to the dealer's market potential. (Tr. 453-454, 460; J.A. 178-181). The dealer's market potential was given effect by using the planning potential number assigned to the dealer by Chrysler. Planning potential represents the number of new units Chrysler felt the dealer should sell based on the dealer's prior rate of sales and the value of its location. (Tr. 298-299, 332-339, 455). The value of the dealer's location was dependent on the number of potential purchasers residing in the area around the dealership and the strength of the dealers of other makes clustered around the Chrysler dealer. (Tr. 296-332). By comparing each individual dealer's retail sales to the total retail sales of all dealers in the dealer's sales region (Chrysler divided the country into 22 sales regions (Tr. 294-295, 446; J.A. 171), one half the formula was derived. The other half of the formula was derived by comparing the dealer's planning potential to the total planning potential for all dealers in the sales region. These two comparisons were expressed in percentage form and were averaged together to derive the percentage of the total purchases assigned to the sales region which each individual dealer in the region would be responsible for purchasing. The dealer's inventory of similar cars was then subtracted from its initial purchase objective to derive the dealer's purchase objective under the program. (Tr. 456-458).

same amount for comparable cars purchased from respondent. (Tr. 15). Hence, there was no price discrimination when cars were initially purchased by the dealers. The alleged price discrimination did not occur until the car was later sold by the dealer during an incentive program. Ironically, it is the individualized objectives – the very thing which equalizes each dealer's opportunity to participate in the programs and to receive equal payment for equivalent performance – which petitioner finds objectionable. Petitioner contends that these objectives resulted in price discrimination since it often had to sell more cars to reach its objective than did other dealers with which petitioner allegedly competed. (Pet. Br. 8 n.5). Petitioner contends that the discrimination is shown by the fact that when the bonus money received is divided by the number of cars sold to receive the bonus, petitioner would often receive less money per unit sold due to its higher objective.[5] Interestingly, under petitioner's theory of discrimination, the large high volume dealerships would always be discriminated against since their objectives would be higher. Petitioner would prefer programs with no objectives or with set objectives whereby the large volume dealers would al-

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[5]Dr. Ignatin, petitioner's expert, calculated what he contended to be the amount of the discrimination by dividing the bonus money received under a retail incentive program for sales of a particular car line by the number of such cars sold by the dealer during the program period. This gave Dr. Ignatin a figure which he called the "per unit rebate" for that car line. Dr. Ignatin performed this calculation for each car line on which a separate bonus was paid. He then compared the per unit rebate per car line which each dealer in the Birmingham area received under a program. If petitioner did not receive the highest per unit rebate, Dr. Ignatin subtracted petitioner's per unit rebate from the highest per unit rebate received by any dealer and multiplied the difference by the number of cars of that car line which petitioner sold during that program period. Dr. Ignatin contended that this figure represented the amount of the price discrimination resulting from each program. (Tr. 228-229; J.A. 132-134).

ways receive much more money than the smaller dealers. (Tr. 460; J.A. 180-181).

Petitioner contends that during the period involved in this case, it competed for sales with three other Chrysler dealers. These alleged competitors were Roebuck Chrysler-Plymouth, Central Motors, and Hall Motor Company. (Pet. Br. 3 n.1; Tr. 44-45, J.A. 17). Each of these dealerships were located in different sections of the greater Birmingham, Alabama metropolitan area. (Tr. 102-103, J.A. 69; Def. Ex. 24, 25, Tr. 332). Petitioner was located in the central downtown area. (Tr. 103, 305; J.A. 69). Roebuck was located in the northeastern area. (Tr. 103, 305; J.A. 69). Central was located in the western area. (Tr. 103, 305-306; J.A. 69). And at the beginning of the relevant period, Hall Motor Company was located in Bessemer, Alabama, which is in the extreme southwestern part of Jefferson County, Alabama. (Tr. 102, 306; J.A. 69). In May, 1971, Hall moved its location to the more heavily populated Vestavia, Alabama area, which is located due south of Birmingham at the southern edge of Jefferson County. (Tr. 88-89, 90, 319, 699-701; J.A. 48-50). At the end of 1973, Hall went out of business. (Tr. 522). Each of these Chrysler dealerships was surrounded by competing dealers representing other makes of automobiles. (Def. Ex. 24, 25, Tr. 332; Tr. 103, 303-304, 321-322, J.A. 69-70).

Petitioner asserts that competition among the four Chrysler dealers in the greater Birmingham area was exceedingly keen. (Pet. Br. 3). This claim is apparently based on Mr. Payne's hearsay testimony that some customers told him they shopped with the other dealerships, and his statement that competition among the Chrysler dealerships was *rough*. (Tr. 45-48; J.A. 17-23). No probative evidence was ever introduced to give any meaning to Mr. Payne's characterization or to corroborate it in any way. No market surveys

were conducted to show the extent of the competition among the Chrysler dealerships or the sensitivity of customers to price differences.[6] In fact, the evidence in this case indicates that price is not the sole determining factor as to where a customer will purchase. The location of the dealership is also very important in a customer's decision of where to buy since there generally will be an ongoing relationship between the dealer and customer for warranty and other service work. (Tr. 582, 641; J.A. 205).

Petitioner asserts that because of the sales incentive programs the other Chrysler dealers in the Birmingham area were able to undersell it, thereby causing it to lose sales, force business and overallow on used car trade-ins. (Pet. Br. 5, 22). The evidence cited to support these statements (Tr. 55, 65-70, 91-95, 97-100, 124-127, 711; J.A. 29-30, 34-40, 50-57, 60-64, 92-95, 223-225) consists solely of Mr. Payne's bare self-serving allegations to this effect. No evidence of the price that any of the four Chrysler dealers were charging for cars during the period of this suit was offered. No corroborating evidence of lost sales, of forcing business, or of overallowing on trade-ins was offered. No evidence was offered of the approximate profit petitioner allegedly lost from forcing business or overallowing on trade-ins or from lost sales. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he had lost sales. (Tr. 93; J.A. 54). He admitted that he did not know what the dealers did with the bonus money after they received it. (Tr. 95; J.A. 57). He indicated that he did not think that the bonus money was passed on to the ultimate consumer in the form of a price reduction. (Tr. 85; J.A. 44). Mr. Payne was not even sure whether he had over-

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[6]This is exactly the type proof which it appears *amicus curiae* Vanco Beverage, Inc., introduced in its case. *See amicus curiae* brief of Vanco Beverage, Inc., at 26-27.

allowed on trade-ins since he qualified his testimony with the preface that he would *possibly* have to overallow on trade-ins in order to make a deal. (Tr. 55; J.A. 30).

Petitioner's expert witness did not corroborate Mr. Payne's assertions of underselling, lost sales, or forcing business, since Dr. Ignatin merely rendered testimony about the possible effects of the incentive programs. Dr. Ignatin prefaced his testimony in this regard with the qualification that it was based to some degree on speculation. (Tr. 202; J.A. 100). He did not give any specific testimony concerning lost sales or profits lost from forcing business or overallowing on trade-ins. He even admitted on cross-examination that he did not have any evidence that any of the Chrysler dealers in the Birmingham area had discounted their prices below petitioner's price because of the incentive programs. (Tr. 255-256; J.A. 135).

Moreover, the statistical evidence in this case disproves Mr. Payne's assertions of lost sales, forcing business or overallowing on trade-ins. In fact, this evidence shows that there was not extensive or keen competition among the four Chrysler dealers. This is evident from a comparison of the new car retail sales and the average gross profit per sale:[7]

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[7]The average gross profit figures in this table represent the average profit realized per retail sale for each dealer for the calendar years 1971, 1972 and 1973. It is simply the difference between what was realized from all retail sales and the cost of such sales. Included in the amount realized from such sales is all incentive money received during the calendar year. Included in the cost of sales figure is the cost of the vehicles, salesmen's commissions, and dealer preparation costs. The difference between these two figures was divided by the number of new car sales for the year to get the average gross profit per sale. (Tr. 526-528; J.A. 190-193).

DEALER COMPARISON[8]

Year	J. Truett Payne Co. Retail Sales	% of Chr. Market	Average Gross Profit	Hall Motor Retail Sales	% of Chr. Market	Average Gross Profit
1970	409	24%	—	262	15%	—
1971	562	27%	390	362	17%	385
1972	576	23%	425	568	23%	435
1973	562	25%	435	549	24%	361

Year	Roebuck Retail Sales	% of Chr. Market	Average Gross Profit	Central Retail Sales	% of Chr. Market	Average Gross Profit
1970	537	32%	—	490	29%	—
1971	688	33%	335	467	23%	311
1972	765	31%	342	588	23%	372
1973	753	33%	380	399	18%	392

This comparison shows that petitioner was not losing sales to other Chrysler dealers[9] and was not forcing business or overallowing on trade-ins since its average gross profit per new retail sale was generally higher than that of the other three dealers. This is not what would be expected if there

[8]The figures in this table were taken from Defendant's Exhibit 31 (J.A. 268-269; Tr. 539) and from Plaintiff's Exhibit 17, 22, 27 and 32 (Tr. 71, 132-133).

[9]Petitioner contends that its 4% drop in market share in 1972 demonstrates sales lost as a result of the incentive programs. There is no evidence in the record from which this connection can be drawn. Instead of losing sales in 1972, petitioner's number of sales increased. Its drop in market share was merely the result of Hall Motor Company's May, 1971 move of its dealership from the weak Bessemer market area to the heavily populated Vestavia area. The total sales made by Vestavia drastically improved after the move. Since the other Chrysler dealers did not show a drop in sales after this move, it is apparent that Hall was making sales to customers who had not previously been Chrysler customers. This conclusion is confirmed by the fact that total new retail sales of the four Chrysler dealers increased from 1,698 sales in 1970, to 2,079 sales in 1971, to 2,494 sales in 1972.

was keen price competition among the dealers which was affected by the sales incentive programs.

As demonstrated by Defendant's Exhibit 31 (J.A. 269, Tr. 539), petitioner's new car operation, the only part of its business which could be affected by the sales incentive programs, was doing well in comparison with the other dealers. Petitioner's problems resulted from its poor used car operation[10] as well as from its weak service and parts department. (Tr. 538-539, 587, 591, 599; J.A. 195-196, 206-207, 211-212, 215).

An analysis of the incentive programs demonstrates that the programs had no significant impact on what competition there may have been among the four Chrysler dealers. (Pt. Ex. 37-54, Tr. 222-223, J.A. 228-245). First, each program only lasted a few months. Second, even under the petitioner's method of calculating the alleged amount of the discrimination, the difference between what the best performing dealer and what the worst performing dealer received per unit sold was generally quite small. There was no evidence introduced to show that if such a difference was reflected in a resale price reduction, or if other competitive use was made of the difference, it would have the effect of diverting business to the so-called favored dealer. Finally, because of the very nature of the programs,

[10]Petitioner suggests that its low profit margin on its used car sales demonstrates that it was overallowing on trade-ins. (Pet. Br. 16 n.7). However, petitioner never introduced any evidence to make this connection. The low profit margin could only be reflective of an overallowance if petitioner entered the trade-in on its books at its inflated value. Petitioner never proved whether the value entered on the books was at the inflated or real value. In fact, since an overallowance on a trade-in is nothing other than a reduction of the sales price of the new car, logic suggests that any overallowance would be reflected in the new car gross profit rather than in the used car gross. This conclusion would be consistent with Mr. Payne's testimony that the reason for the low profit on the used cars was the fact that he was wholesaling a large number of used cars. (Tr. 98-100, J.A. 61-64; Def. Ex. 1 at 77-83, Tr. 122, J.A. 260-264).

the so-called price advantage constantly shifted among all four of the Chrysler dealers. The inherent fairness of the programs is demonstrated by the fact that over the period involved in this litigation, the average difference between what the best performing dealer and the worst performing dealer received under the combined programs was only *eleven dollars* per car. (Tr. 580-582, Def. Ex. 37, Tr. 613; J.A. 202-205, 271).

It was on this set of facts that the Fifth Circuit based its opinion that respondent had not adequately proved that it had in fact suffered antitrust injury or the amount of such damages.

SUMMARY OF THE ARGUMENT

Proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C.A. §13(a), is not sufficient in and of itself to authorize recovery of treble damages under §4 of the Clayton Act, 15 U.S.C.A. §15, since §2(a) is an incipiency statute designed to arrest certain price discriminations before they can work their evil. When dealing with such a prophylactic measure, it is incumbent on the plaintiff to prove, in addition to a violation of the statute, that it did *in fact* suffer *antitrust* injury as a proximate result of said violation and to provide a reasonable measurement of the amount of said injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Since the evil §2(a) was designed to prevent was the favored competitor *drawing* sales or profits away from its disfavored competitor through competitive use of its price advantage, it is incumbent on the plaintiff to prove that it did lose sales or had profits drawn from it because of the illegal price discrimination in order to recover damages under §4.

In this case, petitioner not only failed to prove a violation of §2(a) of the Robinson-Patman Act, but it (1) failed

to prove that it had in fact suffered the type antitrust injury §2 (a) was designed to prevent and (2) did not provide any reasonable measurement of the amount of such injury. Petitioner did not prove that it had lost any sales because of Chrysler's sales incentive programs, or that it had been forced to lower its sales price to compete with the allegedly favored dealers, or that it had to make other expenditures to remain competitive with the so-called favored dealers. Mr. Payne's uncorroborated, bare assertions that the programs did have such an effect was not sufficient to allow the issue to go to the jury. Petitioner simply failed to prove that it was worse off because a competitor purchased cars from Chrysler at a lower price.

The Fifth Circuit correctly rejected petitioner's contention that proof of antitrust injury was not necessary since it was entitled to automatically recover the amount of the price discrimination upon mere proof of a violation of §2 (a). This "automatic damage" theory, as it has come to be called, is in conflict with the requirements of §4 of the Clayton Act, is in conflict with well established antitrust principles and policies, has been explicitly rejected by Congress, and has been rejected by the overwhelming majority of courts that have considered it.

Moreover, what the petitioner contends represents the amount of the alleged price discrimination in this case in no way reflects antitrust injury, since petitioner's method of calculating the amount of the alleged discrimination is based on the erroneous assumption that the more cars petitioner sells, the worse off it is. Obviously, the more sales a dealer makes, the less it could be injured by a price discrimination. Additionally, petitioner's going concern or goodwill value testimony does not support the jury's verdict since petitioner failed to establish that the sales incentive programs were a material cause of it going out of busi-

ness and since such calculations were based on nothing more than speculation and invalid assumptions.

For these reasons, the Fifth Circuit was correct in reversing the judgment of the lower court and directing judgment to be entered in favor of Chrysler.

ARGUMENT

I. The Fifth Circuit's Decision Is Clearly Correct and Is in Accord With this Court's Requirements for Recovery of Treble Damages.

This case concerns the interrelationship of the price discrimination and the private treble damage provisions of the Clayton Act. 15 U.S.C.A. §§2 (a), 4. The Fifth Circuit correctly defined this interrelationship by holding that in order to recover treble damages under §4 of the Clayton Act for a violation of §2 (a), a plaintiff must, as in any other antitrust case, prove: (1) a violation of the antitrust law, (2) that it *in fact* suffered antitrust injury as a result of said violation, and (3) the approximate amount of said antitrust damage. 607 F.2d at 1135 (J.A. 4). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). The court held that to prove the fact of antitrust injury, petitioner could not rest upon a mere showing of a price differential which might tend to injure competition at its level of distribution (proof of violation of §2 (a)), but had to go forward and demonstrate that such injury did in fact occur by showing that as a result of the discriminatory price difference, a favored competitor was able to *draw* sales or profits from it. 607 F.2d at 1136 (J.A. 7). Finding no probative evidence in the record that petitioner had lost sales or had had profits drawn from it by having to lower its price or by having to take other competitive action to

compete with a favored competitor, the Fifth Circuit correctly reversed and remanded with directions to enter judgment in favor of Chrysler.

Recognizing its failure to prove such lost profits, petitioner seeks to avoid its failure of proof by urging this Court to adopt the "automatic damage" theory espoused by Judge Harvey Johnsen in *Fowler Mgf. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). Under this theory, the plaintiff need not prove that it suffered any actual injury to its business to recover damages since it is automatically entitled to recover the amount of the price differential upon a showing of a violation of §2(a). Petitioner seeks to bolster its automatic damage theory with reference to *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) and its progeny, since these FTC cases suggest that the price differential does not have to be actually used to the competitive advantage of the favored competitor in order for there to be a violation of §2(a).

Morton Salt and its progeny do not support petitioner's position since these cases do not involve §4 of the Clayton Act. Instead, they are merely concerned with the quantum of proof necessary under §2(a) to support a FTC cease and desist order. Not only is a cease and desist order a much less severe remedy than treble damages, but in order to obtain such an order it is only necessary to prove that injury to competition *may* result from the price differential (an incipiency standard). Further, the applicability of *Morton Salt* and its progeny to a private action for any purpose is questionable since the underlying theme of all these cases seems to be a deference by the courts to the expertise of the FTC. 334 U.S. at 54; *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). In a private action neither the parties, the court,

nor the jury is cloaked with the presumption of expertise accorded the FTC.

Moreover, the automatic damage theory is in direct conflict with this Court's unanimous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra. Brunswick* is particularly analogous to this case since there the Court was concerned with what proof was necessary to authorize recovery of treble damages for a violation of §7 of the Clayton Act, 15 U.S.C.A. §18. Section 7, like §2 (a), is a prophylactic statute which is violated merely upon a showing that the effect of the merger *may be* to substantially lessen competition. In holding that mere proof of a violation of the incipiency standard was not sufficient to authorize recovery of treble damages under §4, this Court stated:

> "It [§ 7 of the Clayton Act] is, as we have observed many times, a prophylatic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil. . . .' [Citations omitted.]
>
> "Section 4, in contrast, is in essence a remedial provision. It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . .' * * * It nevertheless is true that the treble-damages provision, which makes awards available *only to injured parties,* and measures the awards by a multiple of the *injury actually proved,* is designed primarily as a remedy.
>
> "Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result."

Id. at 485-86. (Emphasis Added). The Court went on to explain what the plaintiff had to prove to recover damages.

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'"

Id. at 489. Thus, to recover treble damages for a §2(a) violation, the plaintiff must prove not only that the price differential may tend to substantially lessen competition at its level of distribution, but that the price difference did in fact so lessen competition and that it was injured as a result.

The competitive injury with which §2(a) is concerned can best be understood by examining the circumstances which resulted in the Robinson-Patman Act. In the years prior to its enactment, the American system of distribution had undergone marked changes because of the rapid growth of chain stores. Between 1926 and 1937, chain stores had nearly tripled their share of total retail sales, going from nine to twenty-five percent. This growth was at the expense of the independent retailer who could not meet the low prices of the chain stores. An FTC investigation revealed that the lower prices of the chain stores resulted not only from operating economies but also from purchasing advantages consisting primarily of special discounts not available to independent retailers.[11]

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[11]Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1062, 1065-66. *See, FTC, Final Report on the Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess., 29-30, 57-63, 85-87 (1935).

In an effort to end the price preferences and other concessions given the chain stores which enabled them to undersell or otherwise draw customers and profits away from the independents, Congress passed the Robinson-Patman Act.[12] Among other things, the Act prohibited certain price discrimination.[13] Congress made the conscious decision not to prohibit all price discrimination but only discriminations which might have the evil affect on competition with which Congress was concerned — that is discrimination which allows the favored competitor to draw sales or profits away from its disfavored competitors.[14]

Thus, under *Brunswick*, in order to recover treble damage for a violation of §2 (a), the plaintiff must prove that as a proximate consequence of the discrimination it lost business to the favored competitor, or lost profits by having to lower its resale price, or was required to take other steps to meet the competition of the favored competitor. This is the type of injury §2 (a) was designed to prevent. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Colum. L. Rev. 979, 992-93 (1977). Since petitioner failed to prove any such antitrust injury, much less the amount thereof, the Fifth Circuit's opinion is correct and should be affirmed.

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[12]Rowe, *supra*, note 11 at 1067-74.

[13]Section 2 (a), 15 U.S.C.A. § 13 (a).

[14]Section 2 (a) of the Robinson-Patman Act only prohibits price discrimination:

> . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

It is significant that this limitation was not included in the Patman bill as originally introduced in the House of Representatives or in the Robinson bill as introduced in the Senate. H.R. 8442, 74th Cong., 1st Sess. (June 11, 1935); S. 3154, 74th Cong., 1st Sess. (June 26, 1935). Both bills prohibited price discrimination irrespective of its likely impact on competition.

II. The Legislative History of the Robinson-Patman Act Supports the Fifth Circuit's Opinion and Compels Rejection of the Automatic Damage Theory.

Not surprisingly, petitioner ignores the legislative history of the Robinson-Patman Act, undoubtedly because Congress specifically considered a presumptive damage provision, identical to petitioner's automatic damage theory, and rejected it.

Both the Patman bill (H.R. 8442) as introduced in the House and the Robinson Bill (S. 3154) as introduced in the Senate provided that as a minimum a plaintiff would be entitled to recover the amount of the illegal price discrimination.[15] The presumptive damage provision encountered strong opposition. In an effort to save the provision, Mr. H. B. Teegarden, the acknowledged author of the Patman and Robinson bills,[16] added the limiting phrase "where the fact of damage is shown." Mr. Teegarden explained that this addition was made to limit the application of the presumptive damages provision to a situation where the fact of

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[15]The Robinson and Patman bills as introduced were identical and with regard to damages provided:

> Section 2 (d). For purposes of suit under section 4 of this Act, the measure of damage from any violation of this section shall, in the absence of proof of greater damage, be presumed to be the unit amount of the prohibited discrimination, payment, or grant concerned, multiplied by— (1) the volume of business involved in such violation in case the plaintiff shall be in competition with the grantor therein in the distribution of the products or commodities concerned; and (2) the volume of plaintiff's business in the respective products and commodities, and for the period of time concerned in such violation, in case the plaintiff shall be in competition with the grantee therein, or, in cases under paragraph (b) of this section, in competition with the intermediary or with the person for or under whose control such intermediary shall act therein.

H.R. 8442 (June 11, 1935) and S. 3154 (June 26, 1935), 74th Cong., 1st Sess. (1935).

[16]*Hearings on H.R. 8442, et al., before the Comm. of the Judiciary House of Representatives*, 74th Cong., 1st Sess. Ser. 10, pt. 1, at 9 (1935) (hereinafter referred to as "*House Hearings*"); Rowe, *supra*, note 11, at 1067.

injury had been proven but the amount of the damage was uncertain.[17] When questioned as to how the fact of the damage would be proven, Mr. Teegarden indicated that it would be necessary to show a loss of customers to the favored competitor because of a lower price made possible by the discrimination. *Hearings on H.R. 8442, et al., before the Comm. of the Judiciary House of Representatives,* 74th Cong., 1st Sess., Ser. 10, pt. 1, at 220 (1935) (hereinafter referred to as *"House Hearings"*).

Despite Teegarden's efforts to save the presumptive damage provision, the House Judiciary Committee eliminated it from the bill which it reported to the House. *H.R. Rep. No.* 2287, 74th Cong., 2d Sess. (1936). No amendments were added on the floor and the House passed the bill without any presumptive damage provision. 80 *Cong. Rec.* 8242 (1936).

The Senate Judiciary Committee accepted §2 (d) as modified by Mr. Teegarden and included the provision in the Robinson bill reported to the Senate. *S. Rep. No.* 1502, 74th Cong., 2d Sess. (1936). In fact, the Committee attached great importance to §2 (d) as being a new remedy to assist in the enforcement of the Act.[18] The Senate in-

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[17]Mr. Teegarden explained the addition as follows:

"And I am free to say that I think there were deficiencies in section (d) as first drawn. Further study of them has revealed them to me and for that reason I have submitted this revision to the committee for its consideration.

(d) *For purposes of suit under section 4 of this act, the measure of damages for any violation of this section shall* –

And that includes A, B, and C, of course –

where the fact of damage is shown –

It requires the fact of damage to be shown. It does not throw the door open for any one to come in and sue in a penal capacity for damages whenever there is a violation. He must show enough to show that he is in some way damaged–"

[18]Concerning the need for the presumptive damage provision, the Committee noted:

cluded the presumptive measure of damage provision in the Robinson bill which because of floor amendments was redesignated as §2 (e) at the time it was passed. 80 *Cong. Rec.* 6436 (1936).

The differences in the bills passed by the House and Senate were resolved in the Conference Committee. The presumptive damage provision was deleted from the bill reported out of the Conference Committee. In explaining this deletion the Committee Report stated:

> "Subsection (e) of the Senate bill set up a *new measure of damages* for violations of the law, whereas the House bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded."

H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. 8 (1936). (Emphasis added).

Petitioner seeks to avoid the effects of the unambiguous legislative history by suggesting that Congress eliminated the presumptive damage provision from the Senate bill

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"Section (d) represents a revision, approved by your committee, of the corresponding part of the bill as referred. It states a presumptive rule for the measurement of damages in private suits for violation, which are authorized by section 4 of the Clayton Act. As the practices against which this bill is directed are injurious not only to the public interest, but as well to the private parties victimized by them; as, in fact, they work their public injury only through their power to damage private competitors, your committee feels strongly that every reasonable facility should be afforded the latter to enable them to recover the damages they have suffered, and thus also to induce their active vigilance in enforcing the act, relieving the Government correspondingly of the burden of its cost. Private remedies in damages for violations of antitrust law have been authorized since its first enactment; but their use has been much impeded, due partly to the speculative character of damages based on loss of business, and to the limited facilities of private parties for obtaining evidence of a kind to satisfy the narrower requirements of the common law, to which such suits were unknown."

Senate Comm. on the Judiciary, S. Rep. No. 1502, 74th Cong. 2d Sess. 8 (1936).

for fear that it would have limited the damages recoverable for a violation of the Act. (Pet. Br. 30-31). Petitioner cites no legislative history to support this contention. There is none. To the contrary, the legislative history clearly demonstrates that this was not the reason the presumptive damage provision was rejected since the presumptive damage provision included in the original Robinson and Patman bills and in the Robinson bill as passed by the Senate included the phrase "in the absence of proof of greater damage." This phrase was obviously included to make it clear that the presumption would not prevent the recovery of any greater damages which could be proved. Moreover, Mr. Teegarden in explaining the presumptive damage provision to the House Judiciary Committee stated: "We have attempted to make some approach to the problem in section (d) by providing a presumptive measure of damages, leaving freedom to prove larger damages, if larger damages can actually be shown." *House Hearings* at 219. *See also,* 80 *Cong. Rec.* 6348 (1936) (Senator Robinson).

Petitioner's reliance on language in *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751 (1947), to support its view of the legislative history is misplaced. (Pet. Br. 30, 31). This language can only make sense if examined in context. In context, all Mr. Justice Jackson said was that the Robinson-Patman Act could not be used to void a contract because Congress never considered such a remedy. Mr. Justice Jackson was underscoring that Congress by amending the Clayton Act in 1936 did not intend to add any new remedies to those already provided by §4 of the Clayton Act, and, therefore, it would be inappropriate for the Court to legislate such a remedy.

Moreover, Petitioner's plea that automatic damages in the amount of the price discrimination ought to be allowed

because proof of lost sales and profits is too great a burden to place on a private plaintiff was specifically considered and rejected by Congress. During the course of the House Hearings Mr. Teegarden, in urging the adoption of the presumptive damage provision, specifically highlighted the difficulty of proving actual business loss.[19] Representative Patman also urged adoption of the presumptive damage provision due to the difficulty of proving actual damages.[20] Senator Robinson, during the floor debate on S. 3154, likewise urged the adoption of the presumptive damage provision of S. 3154 because of the difficulty of proving actual damages under §4 of the Clayton Act. Senator Robinson specifically noted that the presumptive damage provision

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[19]Mr. Teegarden stated:

"Now, a similar section is included in the Sherman Act, as a matter of fact. But, in spite of that, suits for civil damages, for violations of the act, have been few, because of the difficulty of obtaining evidence, a difficulty which has been heightened by the comparative indefiniteness of the prohibitions contained in the act, and also by the difficulty of proving specific damages to the competitor.

"In other words, it is hard for the competitor to say, 'Well, if it had not been for us I would have had so much business." It is hard to prove that the decrease in business is due to the violation complained of."

House Hearings at 219. *See also House Hearings* at 227.

[20]Representative Patman stated:

"The other provision is about treble damages. The bill here proposed, H.R. 8442, has a provision about treble damages. The present law, as I understand it, is ineffective. In the first place, in order to get up the information upon which to base a cause of action against monopoly for destroying your business unfairly and illegally, you would have to have not only a good force of investigators, which would cost you a lot of money, but it would also take a host of fortune tellers and clairvoyants to find out what the other fellow has been doing, and what he expects to do, in order to make your case. It is absolutely impossible, or at least, almost impossible, under the existing law to prove your damage.

"Now, under the provisions of the bill that we have, there are treble damages provided, and the damages can be easily proved. I think that should remain in the bill, because that is one of the best parts of the law. . . ."

House Hearings, 74th Cong., 2nd Sess., Ser. 10, pt. 2, at 395-96 (1936).

was needed since there was no such presumptive provisions under §4 of the Clayton Act.[21] 80 *Cong. Rec.* 6348 (1936) (Senator Robinson). *See also, S. Rep. No.* 1502, 74th Cong., 2d Sess. 1-8 (1936).

Congress was well aware that it might be difficult for private plaintiffs to recover damages actually caused by price discriminations. Nevertheless, it chose not to alter the requirements of §4 of the Clayton Act for recovering damages. Congress concluded that the recovery of triple damages and costs was incentive enough to encourage private enforcement of the Robinson-Patman Act.[22]

Since Congress rejected the effort to change the law to incorporate automatic damages, it is important to review the case law extant at the time. The only case law discussing damages in a secondary-line price discrimination context in existence when the Robinson-Patman Act was passed was this Court's decision in *ICC v. United States ex rel. Campbell,* 289 U.S. 385 (1933), and the Seventh Circuit's decision in *American Can Co. v. Ladoga Canning Co.,* 44 F.2d 763 (7th Cir. 1930).

While *ICC v. United States ex rel. Campbell, supra,* deals with rate discrimination under the Interstate Com-

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[21]Senator Robinson on the floor of the Senate stated:

> The remedy under the Clayton Act is that contained in Section 4, which gives the party injured by reason of the unfair price discrimination the right to bring a suit to recover damages.
>
> The remedy, of course, without some special provision as that found in the pending bill, [S. 3154], is inadequate. There is no presumption in section 4 of the Clayton Act of which the complainant may take advantage. The difficulty of establishing his case is often insurmountable.

80 *Cong. Rec.* 6348 (1936) (Senator Robinson).

[22]This conclusion is buttressed by the legislative history of the treble damage provision of the original Sherman Act and of § 4 of the Clayton Act. 21 Cong. Rec. 2456 (1890) (Senator Sherman); 51 Cong. Rec. 16274-16275 (1914) (Rep. Webb), 16317-16319 (Rep. Floyd); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486, n. 10 (1977).

merce Act,[23] Mr. Justice Cardozo's reasoning is equally applicable to a secondary-line price discrimination case. *Enterprise Industries v. Texas Co.*, 240 F.2d 457, 459-60 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Mr. Justice Cardozo held that the difference in one rate (price) and another is not the measure of damage suffered by the discrimination since such would only measure how much better off the disfavored shipper (purchaser) would have been if it had paid less and would not measure how much worse off it was because a competitor paid less. Accordingly, Mr. Justice Cardozo held that the measure of damage resulting from discrimination was the profits lost by the disfavored shipper (purchaser) from lost sales or from having to lower its resale price to compete with the favored shipper (purchaser). 289 U.S. at 389-91.

In *American Can Co. v. Ladoga Canning Co., supra,* the Seventh Circuit affirmed a jury award because the plaintiff proved that it lost sales to a favored competitor who was underselling it due to an illegal price discrimination and offered reasonable proof of the amount of said damage.

In view of this clear legislative history of unsuccessful legislative attempts to include automatic damages as a remedy for a §2(a) violation, this Court should also reject petitioner's attempt to amend the Act in a manner clearly at odds with congressional intent. This Court should

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[23]It is clear from the legislative history that § 2(a) price discrimination was intended to be analogous to discriminatory rates proscribed by the Interstate Commerce Act. Rep. Patman in his remarks before the House Judiciary Committee advocating H.R. 8442 stated:

> We need a law, a specific law. It could be enforced exactly as the Interstate Commerce Act is enforced against the railroads.

House Hearings at 193-194. And Mr. Teegarden, author of H.R. 8442, analogized H.R. 8442 to the Interstate Commerce Act as follows:

> [But] I think the idea of discrimination is the same in both situations. I framed it that way, on that assumption.

House Hearings at 212-213.

not undertake to supply something that Congress has studiously omitted. Here, Congress has done more than merely acquiesce through silence and "positive inaction" but has affirmatively rejected the very concept which petitioner seeks to have the Court judicially legislate. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). This Court, as it has recognized many times, cannot judicially expand legislation in a manner contrary to the manifest intent of Congress. Petitioner's attempt, in this forum, to have the Robinson-Patman and Clayton Acts rewritten must be rejected. *Great Atlantic and Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Gulf Oil Corp. v. Copp Paving Co., supra*; *Blue Chip Stamps v. Mano Drug Stores*, 421 U.S. 723, 731-34 (1975); *Flood v. Kuhn*, 407 U.S. 258 (1972); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *FTC v. Bunte Bros.*, 312 U.S. 349 (1940).

III. The Automatic Damage Theory Has Been Rejected by the Overwhelming Majority of Courts.

This Court has never considered the question of whether damages may be automatically recovered in the amount of the illegal price discrimination merely upon a showing of a violation of the Robinson-Patman Act. While this theory received some acceptance in §§2(d) and (e) cases shortly after passage of the Act, it seems clear that all Circuits which have considered the question have now rejected automatic damages as a viable damage theory in §2(a) cases.

The leading case discussing the damages recoverable for a §2(a) Robinson-Patman violation is the Second Circuit cases of *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). In a well reasoned opinion by Judge Learned Hand, the Second Circuit reversed the district court's award of "automatic" dam-

ages in the amount of the price discrimination since neither the fact of damage nor the amount thereof was proven. The court correctly held that the plaintiff had to prove a diversion of customers or other actual competitive injury resulting from the price discrimination to recover damages. The court stated that a showing of illegal price discrimination was not sufficient in and of itself to authorize the recovery of damages.

Judge Hand based his opinion on the clear legislative history and on this Court's decision in the analogous case of *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933). In the *Campbell* case, Mr. Justice Cardozo, writing for the Court, stated:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .
>
> "Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When that rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. . . . But a different measure of recovery is applicable where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less. . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less. . . . *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*
>
> ". . . If by reason of the discrimination the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage

> has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Id. at 389-91. (Emphasis added).[24]

The inherent logic of *Enterprise* has made it the landmark case rejecting the automatic damage theory of recovery in Robinson-Patman Act cases. Its lead has been followed by the overwhelming majority of District and Circuit Courts which have considered the question of automatic damages in Robinson-Patman actions.[25]

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[24]Petitioner's attempt to distinguish *ICC v. United States ex rel. Campbell, supra,* on the basis that it is a discriminatory rate case totally ignores the legislative history of the Robinson-Patman Act. *See, supra,* n. 23. Petitioner's reliance on *City of Mishowaka v. American Electrical Power Co.,* 465 F.Supp. 1320, 1340 (N.D. Ill. 1979) to support its position (Pet. Br. 34-35) is misplaced since the Seventh Circuit has now reversed the District Court. *Id.,* 616 F.2d 976 (7th Cir. 1980).

[25]The following cases either cite *Enterprise* as controlling, or have come to similar conclusions in rejecting the automatic damage concept and requiring plaintiffs to prove actual injury in order to recover treble damages:

Second Circuit -- *Interstate Cigar Co. v. Sterling Drug, Inc.,* 1980-2 Trade Cases ¶63,430 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Service, Inc.,* 461 F.Supp. 350 (S.D.N.Y. 1978); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 457 F.Supp. 404 (S.D.N.Y. 1978), *modified on other grounds,* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* ..... U.S. ....., 62 L.Ed.2d 783 (1980); *Lombino & Sons, Inc. v. Standard Fruit and Steamship Co.,* 1975-2 Trade Cases ¶60,527 (S.D.N.Y. 1975); *Krieger v. Texaco, Inc.,* 373 F.Supp. 108 (W.D.N.Y. 1973); *Guyott Co. v. Texaco, Inc.,* 261 F.Supp. 942, (D.Conn. 1966); *Sano Petroleum Corp. v. American Oil Co.,* 187 F.Supp. 345 (E.D. N.Y. 1960);

Third Circuit – *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 478 F.Supp. 243 (E.D.Pa. 1979) *aff'd,* 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980) (wherein both the District Court and the Third Circuit cited *Enterprise* as the rule in the Third Circuit); *Kelly v. General Motors Corp.,* 425 F.Supp. 13 (E.D.Pa. 1976); *Freedman v. Philadelphia Terminals Auction Co.,* 197 F.Supp. 849 (E.D.Pa. 1961), *aff'd,* 301 F.2d 830 (3d Cir.), *cert. denied,* 371 U.S. 829 (1962) (a § 2(c) case where both the

In contrast, petitioner and the *amici curiae* cite only six cases which they argue support the automatic damage theory. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *State Wholesale Grocers v. Great Atlantic and Pacific Tea Company*, 202 F.Supp. 768 (N.D. Ill. 1961); *Becker-Lehmann, Inc. v. Firestone Tire and Rubber Co.*, 202 F.Supp. 514 (E.D. Mo. 1959). Of these, only *Fowler* is a pure §2(a) case. *Bruce's Juices* is a contract case; *Grace* is a §2(c) case; and *Elizabeth Arden* and *State Wholesale* are §§2(d) and (e) cases. In §§2(c), (d), and (e) cases, 15 U.S.C.A. §§13(c), (d), (e), as distinguished from §2(a) cases, 15 U.S.C.A. §13(a), there is no requirement that the action challenged must threaten competition in order to establish a violation. *Becker* is of little help to petitioner since it involves §§2

District and Circuit Courts rejected plaintiff's contention that it was automatically entitled to recover the amount of the illegal brokerage fee);

Fourth Circuit – *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962) *cert. denied*, 372 U.S. 970 (1963) (a §§ 2(d) and (e) case which cited *Enterprise*);

Fifth Circuit – *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted*, ... U.S. ....., 66 L.Ed.2d 20 (1980); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D.Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); *Alexander v. Texas Co.*, 165 F.Supp 53, 57-58 (W.D. La. 1958);

Sixth Circuit – *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961);

Eighth Circuit – *American Can Co. v. Russellville Canning Co.*, 191 F2d 38 (8th Cir. 1951); *Zwicker v. J.I. Case Co.*, 596 F.2d 305 (8th Cir. 1979); *Baxter Imports, Inc v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D.Minn. 1980) (a case involving sales incentive programs similar to those involved in this case);

Ninth Circuit – *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980); *Youngston v. Tidewater Oil Co.*, 166 F.Supp. 146 (D.Ore. 1958).

(a), (d) and (e), and the court merely held that defendant was not entitled to a summary judgment. This leaves only *Fowler* to support the petitioner's theory.

Fowler Mfg. Co. v. Gorlick, supra, is an anomaly. The decision conflicts with the legislative history of §2 (a), the overwhelming case law, and §4 of the Clayton Act. The author of the opinion, Judge Harvey M. Johnsen, a Senior Circuit Judge of the Eighth Circuit sitting by designation, paid no attention whatsoever to the requirements of §4. Instead, Judge Johnsen simply allowed the plaintiff to infer its way to a treble damage recovery merely by showing a price differential. Judge Johnsen stated:

> "... the right of a court to grant a general damage award under the Robinson-Patman Act for the amount of an illegal difference in prices and allowances does not depend upon its having been evidentially established, and the court's being able to find on the basis thereof, that a lessening of competition has in fact occurred, and that the extent of the injury occasioned thereby in the particular situation corresponds to the amount of the discrimination. The Act permits recovery of the amount of a discrimination in prices and allowances without the necessity of any such specific proof or finding as a basis therefor."

415 F.2d at 1253. This language, on its face, conflicts with this Court's decision in *Perkins v. Standard Oil Co.,* 395 U.S. 642, 648 (1969), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

Judge Johnsen based his opinion on dictum from *Bruce's Juices Inc. v. American Can Co.,* 330 U.S. 743, 757 (1947), on his prior opinion in *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945) (a §§2 (d) and (e) case), and on his view that automatic damages were necessary to encourage private

enforcement of the Robinson-Patman Act. Indeed, if the rule of damage espoused by Judge Johnsen in *Fowler* is adopted by this Court it would unquestionably spawn a massive increase in Robinson-Patman suits, since arguably, under *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), plaintiffs would only have to show a price differential to have a chance to recover treble damages and costs. Such a situation would encourage harassment and racketeering suits, a problem about which Congress has already expressed concern.[26] This can only be avoided by limiting the recovery of damages to those who can prove actual antitrust injury and the amount thereof.

Judge Johnsen's reliance on his *Elizabeth Arden* decision is misplaced since that was a §§2 (d) and (e) case. Sections 2 (d) and (e) are only concerned with competitors, not competition. On the other hand, §2 (a) is concerned with competition at various levels of distribution and not with competitors *per se*. *American Oil Co. v. FTC*, 325 F.2d 101, 104-105 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Standard Motor Products, Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959). The importance of this difference was recognized in *State Wholesale Grocers v. Great Atlantic and Pacific Tea Co., supra*, at 776 (a §2 (d) case) wherein the court stated that to require the plaintiff to show a loss of business in order to establish the fact of damage would be to require it to meet the injury to competition requirements of §2 (a).

Moreover, in *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), the Eighth Circuit re-

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[26]*See, Hearings on H.R. 4597 Before Subcomm. 3 of the Comm. on the Judiciary*, 83d Con. 1st Sess., Ser. 8 pt. 1, at 12 (1953); *Report of Nixon Task Force on Productivity and Competition*, ATRR, No. 413, X-7 (June 10, 1969), and Note, *Private Recovery Under the Robinson-Patman Act: Confusion in the Courts on the Proper Measure of Damages*, 21 Syracuse L. Rev. 941, 953 (1970).

fused to apply Judge Johnsen's automatic damage concept in a §2 (a) case, even though the court held that a violation of §2 (a) had been proved. The Eighth Circuit reversed the District Court's award of damages in the amount of the price discrimination, and stated:

> "It is our understanding that, in order for a plaintiff to recover damages in a case such as this [§ 2 (a)], it is not enough to show that a defendant was guilty of price discrimination which might lessen or injure competition, but it is also necessary for the plaintiff to prove that the wrong done proximately resulted in ascertainable damages to its business and property."

Id. at 54.

Russellville has been widely cited as overruling Judge Johnsen's *Elizabeth Arden* decision. *See, e.g., Enterprise Industries, Inc. v. Texas Co., supra; Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1080 (1957). This certainly appears to be the case, since in *Russellville*, the Eighth Circuit cited *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949) as support for its decision. 191 F.2d at 56. *Sun Cosmetic* is a §§2 (d) and (e) case based on facts virtually identical to those in *Elizabeth Arden*. However, the Second Circuit, in an opinion written by Judge Learned Hand, rejected the theory of recovery applied in *Elizabeth Arden* and held that to recover treble damages the plaintiff had to prove a diversion of business and the amount of the loss caused thereby. Judge Johnsen obviously recognized that *Russellville* was inconsistent with his *Elizabeth Arden* opinion since he was on the panel in *Russellville* and dissented.

Recent Eighth Circuit cases confirm that Judge Johnsen's automatic damage theory is not applicable in §2(a) cases in that Circuit. *Zwicker v. J. I. Case Co.*, 596 F.2d 305 (8th Cir. 1979) (a §2(a) case where illegal price discrimination was proved, but automatic damages were not allowed); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). *See also, Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) (a §2(a) case involving automobile sales incentive programs similar to the ones involved in this case wherein the court held that the plaintiff had to prove actual damages resulting from the programs).

Mr. Justice Jackson's dictum concerning the recovery of damages in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947) lends little support to the *Fowler* decision.[27] *Bruce's Juices* was a contract case. The only issue before the Court was whether a violation of §2(a) could be used as an affirmative defense to void a contract. Mr. Justice Jackson's comments, upon which Judge Johnsen and the petitioner rely, were directed toward an abstract suggestion by Bruce's Juices that it would be difficult to prove actual damages in a §2(a) case. The damage issue was not given extensive attention in the briefs filed with the Court, and the relevant legislative history on damages was not adequately brought to the Court's attention.

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[27]Petitioner asserts that Mr. Justice Jackson's discussion concerning recovery of damages is more than mere dictum. (Pet. Br. 30). However, a reading of *Bruce's Juices* does not support this suggestion. Further, the courts and commentators have uniformly considered such language to be dictum. *See, e.g., Enterprise Industries, Inc. v. Texaco Co.*, 240 F.2d 457 (2d Cir. 1957); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — the Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 31 (1971); Note, *supra* n. 26, 21 Syracuse L. Rev. at 945 (1970); Rowe, *supra* note 11, at 1078. In fact, Judge Johnsen in *Fowler* acknowledged that the Supreme Court had not adjudicatively passed upon the automatic damage question. 415 F.2d at 1250.

Fowler has been subject to severe criticism by the commentators as espousing a damage theory which will result in windfall profits for the plaintiff, in fact, triple windfall profits. Rez, *Causation And Automatic Damages In Secondary-Line Injury Cases Under §2(a) of the Robinson-Patman Act: Is Fowler v. Gorlick Dead?* 55 Notre Dame Law. 660 (1980); Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 31-35 (1971); Note, *Private Recovery Under The Robinson-Patman Act: Confusion In the Courts On the Proper Measure of Damages,* 21 Syracuse L. Rev. 941 (1970). Likewise, economists have found the automatic damage theory to be unsound, while approving the damage rule of the *Enterprise* case. Guilfoil, *Damage Determination In Private Antitrust Suits,* 42 Notre Dame Law. 647, 677 (1967).

Moreover, it does not appear that *Fowler* now represents the law of the Ninth Circuit. *Hasbrouck v. Texaco, Inc.,* 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980). In *Hasbrouck,* Judge Callister pointed out that *Fowler* was decided prior to this Court's decisions in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* both of which are irreconcilable with the automatic damage rule announced in *Fowler.* Judge Callister noted that since *Brunswick,* the Ninth Circuit has consistently held that damages do not automatically flow from proof of an antitrust violation, and that to recover damages the plaintiff must prove antitrust injury to its business or property and the amount thereof. *Handgards, Inc. v. Ethicon, Inc.,* 601 F.2d 986 (9th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1980); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979). Additionally, in *Rutledge v. Electric Hose & Rub-*

ber Co., 511 F.2d 668 (9th Cir. 1975), the Ninth Circuit indicated that *Fowler* is no longer the law by citing *Youngston v. Tidewater Oil Co.*, 166 F.Supp. 146 (D. Ore. 1958), rather than *Fowler*, as stating the law as to what must be proven to recover damages for a violation of §2 (a) of the Robinson-Patman Act. In *Youngston*, the court stated:

> ". . . [T]o come within the reach of the provisions of the Robinson-Patman Act, one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both."

Id. at 147.

Hence, it appears that the Second, Third, Fourth, Fifth, Sixth, Eighth and Ninth Circuits have all now rejected the automatic damage theory in a §2 (a) Robinson-Patman Act secondary-line case. All these Circuits have adopted the reasoning of the *Enterprise* case. The First, Seventh,[28] Tenth[29], and District of Columbia Circuits do not appear to have considered the applicability of the automatic damage theory in a §2 (a) secondary-line case. Thus, it may be fairly stated that all Circuits which have considered the automatic damage theory in a §2 (a) secondary-line context have now rejected it and require proof of actual antitrust injury and a reasonable measurement thereof in order to recover treble damages under §4 of the Clayton Act.

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[28]The case of *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), a secondary-line case decided prior to enactment of §2 (a), suggests that the Seventh Circuit will require proof of the fact of injury and the amount thereof to recover treble damages.

[29]Two primary-line discrimination cases suggest that the Tenth Circuit will reject the automatic damage theory in a §2 (a) secondary-line case. *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

Indeed, the compelling logic of Judge Learned Hand's *Enterprise* opinion, particularly in light of this Court's most recent explication of antitrust injury in *Brunswick,* requires the rejection of petitioner's attempt to breathe life into an otherwise moribund theory which has never gained substantial acceptance and is completely inconsistent with all antitrust damage principles.

IV. The Sherman Act Cases Do Not Support an Automatic Damage Theory in Robinson-Patman Act Cases and Are Not in Conflict With the Fifth Circuit's Opinion.

Petitioner's reliance on this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) to support the automatic damage theory and its right to recover damage in this case is misplaced. Overcharge under the Sherman Act and price discrimination under the Robinson-Patman Act are distinctly different concepts. When a party is overcharged in violation of the Sherman Act, he is paying an unlawfully fixed price which is in excess of what the competitive price would have been in the absence of the violation. In a §2 (a) Robinson-Patman price discrimination case, the price paid by the disfavored competitor is not an overcharge and is not in and of itself illegal. Unlawful price discrimination results only if (1) a competitor is charged a lower price and (2) the required injury to competition may result. The gravamen of the §2 (a) offense is not a felonious overcharge, as in price fixing, but an unlawful undercharge which has the requisite probable anticompetitive consequences.

The distinction between an overcharge and price discrimination has long been recognized by the courts which have rejected the automatic damage concept in §2 (a) Rob-

inson-Patman cases. *See, e.g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases, ¶63,343 (E.D. Wash. 1980); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350 (S.D. N.Y. 1978). *Cf. ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933). In *Hasbrouck, Edward J. Sweeney*, and *Uniroyal*, the plaintiffs specifically made the same arguments made by the petitioner in this case. In each instance, the court rejected the applicability of *Hanover Shoe* and other Sherman Act overcharge cases to a §2(a) price discrimination case.

This Court has likewise recognized the fundamental differences between the Sherman Act and the Robinson-Patman Act. *Compare, Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (wherein this Court referred to the Sherman Act as the "charter of economic liberty"), and *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953) (wherein this Court recognized that the Robinson-Patman Act could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"). *See also, United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51 (1978). In fact, in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755-56 (1947), the case so heavily relied upon by petitioner, this Court specifically discussed the differences between offenses under the Sherman Act and those under the Robinson-Patman Act. Mr. Justice Jackson noted that, unlike a Sherman Act case, at least two transactions are necessary to constitute a §2(a) offense and concluded that "[t]hese characteristics show that the entire basis for judging under the two acts

is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act." 330 U.S. at 756.

Moreover, in *Hanover Shoe* this Court recognized the differences between an illegal overcharge and price discrimination. 392 U.S. at 494. The difference was also implicitly recognized by the Court's citation of *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) and *ICC v. United States ex rel. Campbell, supra,* in support of its holding. 392 U.S. at 490 and n. 8. Both these ICC cases recognize the distinction between an overcharge and a price discrimination.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) also indicates the inapplicability of *Hanover Shoe* and other Sherman Act cases to a price discrimination situation. In *Perkins,* this Court allowed the discrimination to be traced through three separate levels of distribution, and allowed the plaintiff to recover the damage suffered because the favored competitor was able to undersell him and thereby divert business. This presents the antithesis of the holding of this Court in *Hanover Shoe* and in *Illinois Brick Co.*

V. Petitioner Did Not Prove That It Suffered Any Antitrust Injury.

As demonstrated above, in order for a plaintiff to establish that it has suffered antitrust injury as a result of a violation of §2 (a) of the Robinson-Patman Act, it must prove that it lost sales, or had to lower its resale price, or had to make other expenditures as a proximate consequence of the price discrimination. There is absolutely no evidence in this case from which the jury could reasonably have inferred that the petitioner lost sales, was forced to lower its resale price, or was forced to make other expenditures as a proximate consequence of the sales incentive programs. The Fifth Circuit has reviewed the record, and there is no

need for this Court to duplicate its effort. Instead, this Court should only concern itself with the questions of law raised by the petitioner.

However, if this Court should undertake an independent review of the record, a few brief comments about the evidence in addition to those set forth in the Statement of the Case are in order. First, it is well established that bare uncorroborated assertions of antitrust injury do not represent substantial evidence to allow the case to go to the jury. *See, e.g., Shumate & Co. v. National Association of Security Dealers,* 509 F.2d 147 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975); *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963); *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Momand v. Universal Film Exchanges,* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949). No evidence was offered by the petitioner to corroborate any of Mr. Payne's conclusory assertions of injury.

The fact that petitioner's share of total Chrysler sales in the Birmingham area decreased 4% in 1972 is not corroborating evidence of lost sales. The obvious reason for this decrease was Hall Motor Company's move from Bessemer to Vestavia, Alabama in May, 1971. As demonstrated by the comparison of dealerships set forth in the Statement of the Case, the relocation resulted in more Chrysler sales being made in the Birmingham area. This is the reason for petitioner's minor decrease in market share. In fact, petitioner's sales volume actually increased in 1972 over 1971.

Petitioner's expert witness, Dr. George Ignatin, did not offer any evidence to corroborate Mr. Payne's assertions of injury. Dr. Ignatin's testimony about competitive injury dealt only with the possible affects of the programs (the incipiency standard of §2(a)). (Tr. 202-204, 222, 255-258;

J.A. 99-103, 131, 134-139). Dr. Ignatin commenced this testimony with the warning that it was based to some degree on speculation. (Tr. 202; J.A. 100). He, in effect, conceded that he did not have any evidence of actual competitive injury when he admitted that he did not know whether the other Chrysler dealers in the Birmingham area had in fact undersold petitioner. (Tr. 255-256; J.A. 135). There is absolutely no evidence in this case concerning what the other Chrysler dealers in the Birmingham area did with the bonus money they received.

Petitioner cites *Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972) and *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) as supporting its right to recover damages. (Pet. Br. 16). These cases do not help petitioner since in both of these cases the plaintiffs offered substantial evidence of antitrust injury. In *Bruce's Juices*, there was probative evidence of lost sales proximately caused by the price discrimination. *See, Bruce's Juices v. American Can Co.*, 87 F.Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951). There was no such evidence in this case. In *Bargain Car Wash*, there was substantial probative evidence of underselling by the favored competitors and lost volume by the disfavored plaintiff.[30] Petitioner did not offer any such evidence in this case.

Petitioner even goes so far as to suggest that this Court's decision in *Perkins v. Standard Oil Co.*, 395 U.S. 642

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[30]In *Bargain Car Wash* the Seventh Circuit did not hold that the plaintiff need not show lost sales in order to recover damages as stated by petitioner. (Pet. Br. 16). The court merely held that proof of *specific* lost sales was not necessary. 466 F.2d at 1174. It appears that the purpose of the court in making this statement was to indicate that circumstantial evidence could be used to establish the necessary antitrust injury.

(1969) supports its right to recover damages. (Pet. Br. 23). This suggestion is mystifying since in *Perkins* this Court specifically stated:

> "Before an injured party can recover damages under the Act [§2(a) of Robinson-Patman]; he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injured suffered."

Id. at 648. The plaintiff in *Perkins* established a causal connection by proving that it was in fact being undersold by its favored competitors which caused it to lose business. *Id.* at 645, 648, 649. No such proof was offered in this case.

Since petitioner did not prove that it suffered any antitrust injury as a proximate consequence of the incentive programs, there is no evidence in the record to support a finding by the jury that the incentive programs were a material cause of petitioner going out of business. In fact, the statistical evidence demonstrates that the primary reason petitioner's business failed was its poor used car operation. (Tr. 538-539, J.A. 195-196). Petitioner consistently realized the lowest average gross profit on its used car sales. (Def. Ex. 31, Tr. 539; J.A. 269).

In its brief, petitioner opined that its low used car profit was the result of overallowing on trade-ins. (Pet. Br. 22). There is no evidence in the record to support this speculation by petitioner. Moreover, Mr. Payne indicated that the reason for the low used car profits was the fact that Chrysler Credit Corporation had reduced petitioner's line of credit on used cars which forced him to wholesale these cars at a lower profit margin. In fact, Mr. Payne acknowledged that this action by Chrysler Credit is what *primarily* destroyed his business. (Tr. 98-100; Def. Ex. 1, p. 77-83, Tr. 122; J.A. 61-64, 260-264).

This testimony by Mr. Payne totally invalidates the unsupported assertion of petitioner on page 22 of its brief that Chrysler Credit reduced the used car line of credit because of the low profits being realized on used car sales. According to Mr. Payne, the credit restriction caused the low profits not vice versa.

Additionally, the statistical evidence demonstrates that the sales incentive programs did not affect petitioner's used car operation or its overall performance. This is evident from the fact that in 1972, petitioner averaged its lowest bonus per unit sold of any of the years involved in this case. It averaged $34 per car as compased to $80 per car for Central, $62 per car for Roebuck, and $72 per car for Vestavia (Hall Motor Company). (Def. Ex. 36, Tr. 613; J.A. 270). However, in 1972, petitioner realized its highest gross profit on used car sales of any of the years involved in this suit, and lost less money than in 1971 or 1973. (Def. Ex. 31, Tr. 539; J.A. 269). In 1971 and 1973, petitioner averaged the largest bonus per unit sold of any of the Birmingham Chrysler dealers, yet its gross profit on used car sales was lower than in 1972, and it lost much more money in 1971 and 1973 than in 1972. (Def. Ex. 31, 36, Tr. 539, 613; J.A. 269, 270).

The failure of petitioner to prove antitrust injury resulting from the incentive programs precludes the recovery of any damages under §4 of the Clayton Act.

VI. Petitioner Used Improper Methods of Calculating Damages Which Did Not Reflect Antitrust Injury.

Even if the petitioner had presented evidence of antitrust injury resulting from the sales incentive programs, it still is not entitled to recover damages, since it failed to introduce any probative evidence of the amount of injury. All petitioner's damage calculations are premised on the presump-

tion that it is entitled to recover the amount of the alleged price discrimination as lost profits.

(a) The Amount Of The Alleged Discrimination Does Not Reflect Antitrust Injury In This Case.

What petitioner contends represents the amount of the price discrimination does not reflect the antitrust injury which the sales incentive programs could have inflicted. This is evident from the manner in which petitioner computed what it contends to be the amount of the discrimination. Petitioner determined this amount by calculating what it called the "rebate per unit sold" received by all Chrysler dealers in the Birmingham area under each incentive program. When petitioner did not receive the highest rebate per unit, it took the difference between what it received per unit and the highes rebate per unit received by any of the other Chrysler dealers, and multiplied this difference by the number of such cars sold by petitioner during the program period. (Tr. 228-229; J.A. 132-134). This calculation resulted in a total alleged discrimination of $81,248.94.[31] (Tr. 191; J.A. 99).

Petitioner made no attempt to establish that this figure reasonably reflected profits lost from lost sales, from forcing business, from overallowing on trade-ins, or from having to take any other steps to remain competitive with the so-called favored dealer. In short, this figure does not reflect how much worse off petitioner was because other dealers received more bonus money.

[31]This calculation does not accurately reflect the amount of any price discrimination. In this case, petitioner contended that the retail sales incentive programs were discriminatory because its qualification objectives were too high. (Tr. 57-58, 84, 102; J.A. 43, 67-68). Hence, the amount of the discrimination, if indeed there was any, would be the difference between what petitioner actually received from participation in the retail incentive programs and what it would have received if its objectives had been "non-discriminatory." Petitioner did not present any evidence of what this amount would have been.

Moreover, this method of calculating damages is fundamentally unsound since it assumes that the more cars petitioner sold during a program, the more it was injured. Such an assumption is unrealistic. The more cars petitioner sold, the less it could have been injured by the incentive programs. This is quite obvious from the fact that petitioner averaged the highest gross profit on new retail sales of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, Tr. 539; J.A. 268). Unquestionably, petitioner's injury would not have increased as its sales increased. (Tr. 565-567).

Petitioner's method of calculating the alleged amount of the discrimination is very similar to the plaintiff's damage calculations in *Rea v. Ford Motor Co.*, 497 F.2d 577, 588-90 (3rd Cir.), *cert. denied*, 419 U.S. 868 (1974). The Third Circuit resoundingly rejected such damage calculation because it did not reflect the injury which the antitrust violation could have inflicted.

Another basic flaw in petitioner's damage calculation is that it did not make any deduction from the alleged amount of the discrimniation to reflect the occasions when petitioner received the highest rebate per unit or when it received more under the 5% rebate program than it would have under the alternative incentive program.[32] (Tr. 565). By failing to make such adjustments, petitioner's calculations resulted in inflated damages.

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[32]The 1971 Big Dollar Payoff is a good example of how petitioner inflated its damage calculation by not making a credit adjustment when it received the highest per unit rebate. According to petitioner's calculations, under this program, it received $28.43 per unit for sales of Valiants while Roebuck Chrysler-Plymouth received $54.03 per unit. Since petitioner sold 51 Valiants during the program, petitioner contends that it suffered a discrimination of $1,305.65. However, on sales of all other car lines, which constituted most of the sales under the program, petitioner received the highest per unit rebate. Petitioner received $107.98 per unit compared to $35.59 per unit for the next high dealer, Roebuck. Obviously, petitioner was not injured by this program; nevertheless, it included the $1,305.65 of alleged discrimination in its total discrimination figure and did not deduct anything for the payments it received above the other dealers. (Pt. Ex. 39, Tr. 222-223; J.A. 230).

Petitioner never attempted to correlate the alleged amount of discrimination to profits which it allegedly lost as a result of favored competitors making competitive use of their bonus money. Hence, the alleged amount of the discrimination is not reflective of antitrust injury and cannot support the jury's verdict. To allow petitioner to recover the alleged amount of discrimination would be tantamount to awarding petitioner triple windfall profits, a result never intended by Congress nor sanctioned by this Court.

(b) Petitioner's Going Concern Calculations Were Based On Speculation And Unsupported Assumptions And Do Not Reflect Antitrust Injury

Petitioner's going concern or good will calculations also do not support the jury's verdict. First, there was no proof that the incentive programs were a material cause of petitioner going out of business.[33] Moreover, these calculations were based on nothing other than speculation and unsupported assumptions. The courts have made it clear that going concern calculations or projections of future profits may not be based on speculation, guesswork or conjecture but must be based upon reasonable assumptions supported by the record. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 80-83 (1st Cir. 1970); *Joseph E. Seagram & Sons v.*

[33]Dr. Ignatin, petitioner's expert, did make a vague statement that if petitioner had received $81,000 more profit (the alleged amount of the price discrimination) over the period involved in this suit, he thought that it might have continued in business. (Tr. 213; J.A. 118). Since the alleged amount of the discrimination does not reflect antitrust injury to petitioner, this vague suggestion is not sufficient to establish that petitioner's business failed as a proximate consequence of the incentive programs. Further, the evidence indicates that even if petitioner had received an extra $81,000 in profits over the period involved in this case, it still would have gone out of business, since it still would have lost over $30,000 during this period (Tr. 268; J.A. 149), and, according to Dr. Ignatin's projections, would have lost an additional $20,000 in 1974 (Tr. 210; J.A. 113-114) and $10,000 in 1975 (Tr. 211; J.A. 114-115).

Hawaiian Oke Liquors, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). Instead, going concern calculations or projections of future profits must be based on such relevant factors as the local and national economy, on the condition of the relevant market, on likely future sales, and on the costs of making such sales. *Id.* In calculating the going concern value for petitioner and in projecting future profits, Dr. Ignatin failed to follow the guidance of these cases. As Judge Johnson correctly noted, his predictions were based on sheer speculation. 607 F.2d at 1137, (J.A. 8-10).

Dr. Ignatin used two equally faulty methods of calculating plaintiff's going concern value. Under his first method, he simply took what Mr. Payne told him was the good will value of the petitioner after it merged with LeSeur Motors in 1955 and multiplied this figure by a growth rate of 4% per year.[34] This resulted in a projected going concern value for the petitioner of $100,000 in May, 1974. (Tr. 207-209; J.A. 108-111). Dr. Ignatin did not take into account any economic factors, local market conditions, or how the petitioner actually performed over this time period. (Tr. 209, 265; J.A. 112, 145). Further, his calculation was never related to the incentive programs or their effect on petitioner.

Under his second method of calculating petitioner's going concern value, Dr. Ignatin projected future profits which he opined the petitioner would have made through 1977 (the year this case went to trial). He then discounted these projected profits back to a 1974 value of $32,000 by using a 6%

[34]The speculative nature of this method of calculating going concern value is accentuated by Dr. Ignatin's admission that Mr. Payne was not clear about what the good will value was. (Tr. 207; J.A. 107-108). Dr. Ignatin did not make any independent study to try and confirm Mr. Payne's equivocal estimate. (Tr. 261-262; J.A. 140-142).

discount rate. (Tr. 210-217; J.A. 112-124). Next, he was allowed, over objection, to calculate a going concern value of petitioner in 1977, based on his assumption that it was reasonable to assume that after 1977 petitioner would earn $20,000 profit per year. He capitalized this at a 10% rate which resulted in a going concern value of $200,000 in 1977. This figure was discounted to a 1974 value of $170,000 by using a 6% discount rate. (Tr. 217-218; J.A. 124-126). Dr. Ignatin combined the discounted future profit projection and the 1977 going concern value to derive his second going concern value of $202,000. (Tr. 219-220, J.A. 127-128; Pt. Ex. 63, Tr. 223).

This second method is faulty because the going concern value was computed at an improper date and because it allowed petitioner to recover both going concern value and future profits. *Pollock & Riley v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971). Further, in making his projections, Dr. Ignatin did not take into account the local economy, how the local automobile market fared, how the local Chrysler dealers performed, what future sales could have been reasonably expected, or what future costs and expenses would reasonably have been incurred. (Tr. 269-270, J.A. 151-152, 155). Moreover, Dr. Ignatin's basic assumption that the local dealers would fare as Chrysler did is unsupported by the record. The record shows that Birmingham was a poor market for Chrysler (Tr. 270; J.A. 152), and that the profits realized by the local dealers did not track the profits being realized by Chrysler. (Tr. 606-610; J.A. 216-220).

Dr. Ignatin's second method of calculating going concern value is just as speculative as his first method. Neither will support the jury verdict, and it was error for the trial judge to allow the jury to consider such testimony. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 999-1000 (5th Cir. 1976); *Joseph E. Seagram & Sons v. Hawaiian Oke Liquors, supra; Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra.*

VII. The Public Interest Will Be Served By Affirming The Fifth Circuit.

When the rhetoric in petitioner's brief is cast aside, it is clear that petitioner is urging this Court to reverse the Fifth Circuit for rejecting the automatic damage theory and requiring the petitioner to prove that it suffered actual antitrust injury and the amount thereof. Petitioner urges the Court to adopt such a damage rule as matter of public policy. However, determining public policy is the perogative of the Congress and not the courts. Where Congress has unmistakenly declared the policy, as here, by unequivocably rejecting the automatic damage principle, this Court should not undertake its own policy consideration. Nevertheless, the public interest would best be served by rejecting petitioner's automatic damage concept and affirming the Fifth Circuit.

The application of an automatic treble damage rule would more likely than not redress any imbalance in the competitive positions of the favored and disfavored purchaser to such an extent that the originally favored purchaser would be far worse off than the originally disfavored purchaser. Such a policy would be especially pernicious, in cases such as this, if differences in price resulting from incentive programs initiated in good faith to reward competitive effort are to be regarded as illegal. The indolent, incompetent, inefficient businessman who does not strive to be competitive will be rewarded by treble damages for the asking. He will be encouraged to sit back and not sell or compete aggressively in the certain expectation that when the contest is over he may very well receive more from his supplier than he would if he had tried to compete, regardless of whether he has lost any business or not. Surely in this age of declining productivity the country does not need this particular public policy.

The adoption of an automatic damage rule by the Court will undoubtedly have an adverse, if not devastating, effect in the market place. In view of the arguably lenient standard of what is required to infer the requisite injury to com-

petition under § 2(a), the adoption of an automatic damage rule would inevitably spawn an incalculable number of meritless and frivolous § 2(a) cases. Plaintiffs will be seeking what are undeubtedly windfalls since the amount of the discrimination may often be sifnificently more than any actual loss suffered by the plaintiff. Indeed, according to petitioner's theory, there need not be any actual injury at all before a plaintiff would be entitled to recover three times the amount of a price discrimination. The threat of massive treble damage exposure every time a seller lowers his price, irrespective of any actual injury resulting therefrom, can only foster price rigidity, impede natural market forces, thwart competition, and result in economic stagnation.[35]

The adoption of the automatic damage theory would, in addition to authorizing windfall recoveries, endanger the existence of many businesses. That danger is well illustrated by the case at bar. Under plaintiff's theory of what constitutes an illegal price discrimination, there has been an illegal discrimination every time the same per unit bonus is not realized by the individual dealers under an incentive program. Because of the individualized objectives involved in these programs, assuring all dealers an equal opportunity to participate in the programs and to receive equal bonuses for comparable performance over their objectives, it is extremely unlikely that any two dealers in a market area will receive the same exact per unit bonus on every car sold during a program. The adoption of the automatic damage theory would mean that most Chrysler dealers in the United States would have an enforceable treble damage claim against Chrysler arising from one or more of the incentive programs. Certainly, Chrysler cannot survive such an onslaught of lawsuits. Neither could other manufacturers which might

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[35] *See,* Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 35 (1971); Note *supra.*, 21 Syracuse L. Rev. 941, 953 (1970); Rez, *Causation And Automatic Damages In Secondary-Line Injury Cases Under § 2(a) Of The Robinson-Patman Act: Is Fowler v. Gorlick Dead?* 55 Notre Dame Law. 660, 679 (1980).

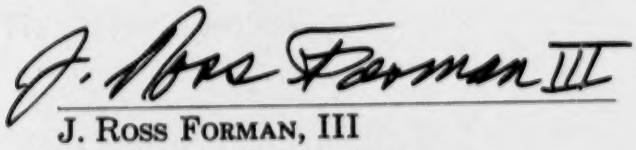
offer similar incentive programs in connection with the sale of their products.

Any policy analysis requires that the Fifth Circuit's opinion be affirmed. Not only will this avoid disastrous results, but the cause of economic justice including the compensation of those who suffer actual antitrust damage from illegal price discrimination, will be served in the framework of our traditional principles of jurisprudence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Fifth Circuit's opinion is consistent with congressional intent, traditional antitrust principles, and the public interest, and, therefore, should be affirmed.

Respectfully Submitted,



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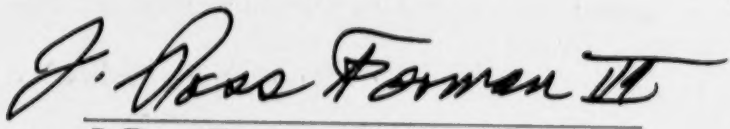
CERTIFICATE OF SERVICE

I, J. Ross Forman, III, a member of the Bar of this Court, hereby certifies that three copies of Respondent's Brief on the Merits have been separately served upon C. Lee Reeves, attorney of record for petitioner, at 2222 Arlington Avenue, South, Birmingham, Alabama 35205, upon John T. Cusack, attorney of record for *amicus curiae* Vanco Beverage, Inc., at One First National Plaza, Suite 3300, Chicago, Illinois 60603, and upon Robert H. Whaley, attorney of record for *amicus curiae* Hasbrouck, at Fifth Floor, Spokane & Eastern Building, Spokane, Washington 99201, by depositing the same in the United States mail, first class postage prepaid, and properly addressed on December 30, 1980.



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